

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LUIS F. CANDELARIA and U.S. POSTAL SERVICE,
POST OFFICE, Newark, NJ

*Docket No. 00-174; Submitted on the Record;
Issued December 15, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
VALERIE D. EVANS-HARRELL

The issues are: (1) whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for merit review under 20 C.F.R. § 10.608; and (2) whether the Office properly denied appellant's July 23, 1999 request for reconsideration under 5 U.S.C. § 8128(a) on the grounds that the request was not timely filed and failed to present clear evidence of error.

On March 18, 1993 appellant, then a 44-year-old modified rehabilitation clerk, injured his left arm, shoulder and back as a result of a fall he sustained in the performance of duty. The Office accepted appellant's claim for lumbosacral and cervical sprain, left elbow contusion and left medial epicondylitis. Additionally, appellant received appropriate wage-loss compensation for his employment-related injuries. After returning to his prior work duties, appellant sustained a recurrence of disability on July 13, 1994. He returned to work in a part-time, light-duty capacity on July 25, 1994. The Office accepted appellant's claim for recurrence of disability on November 15, 1994.

Appellant filed another notice of recurrence of disability (Form CA-2a) on September 13, 1995. He alleged that he experienced a recurrence of disability on May 17, 1995 causally related to his previously accepted employment injury of March 18, 1993. Appellant explained that following the completion of his duties on May 16, 1995, he experienced severe pain in his neck, back and left elbow. He ceased working on May 17, 1995 and returned to work on September 13, 1995.

By decision dated April 22, 1996, the Office denied the claim for recurrence of disability based on appellant's failure to establish that his current condition was causally related to his March 18, 1993 employment injuries. Appellant subsequently requested an oral hearing, and in a decision dated November 8, 1996 and finalized on November 9, 1996, the Office hearing representative set aside the prior denial and remanded the claim for further development.

After further development of the record, the Office denied the claim on February 25, 1997 based on appellant's failure to establish that he was totally disabled from performing his limited-duty assignment during the period May 17 to September 11, 1995. The denial was subsequently affirmed by an Office hearing representative in a decision dated and finalized on July 17, 1998. The hearing representative found that appellant failed to establish that his claimed cervical disc herniations arose as a result of his March 18, 1993 employment injury. He further concluded that appellant failed to establish that he was totally disabled during the period May 17 to September 11, 1995.

On July 15, 1999 appellant requested reconsideration. Additionally, he requested a 30-day extension in order to obtain and submit additional medical evidence in support of his request for reconsideration. By decision dated July 20, 1999, the Office denied appellant's request for reconsideration without reaching the merits of his claim.¹

Appellant again requested reconsideration on July 23, 1999. His request was accompanied by a July 14, 1999 report from his treating physician, Dr. Allen S. Glushakow, a Board-certified orthopedic surgeon. In a decision dated August 12, 1999, the Office denied appellant's request for reconsideration pursuant to 5 U.S.C. § 8128(a) on the grounds that the request was not timely filed and failed to present clear evidence of error.

The Board finds with respect to the July 20, 1999 decision denying reconsideration, the Office properly exercised its discretion in refusing to reopen appellant's case for merit review under 20 C.F.R. § 10.608.

Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by either: (1) showing that the Office erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office.² Section 10.608(b) provides that when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.³

Appellant's July 15, 1999 request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, he did not advance a relevant legal argument not previously considered by the Office. Consequently, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2). With respect to the third requirement, submitting relevant and pertinent new evidence not previously considered by the Office, the July 20, 1999 decision denying reconsideration correctly noted that appellant did not submit any

¹ Regarding appellant's request for a 30-day extension, the Office found that the one-year time period within which to file a request for reconsideration afforded appellant ample time to submit any additional medical evidence in support of his request for reconsideration.

² 20 C.F.R. § 10.606(b)(2) (1999).

³ 20 C.F.R. § 10.608(b) (1999).

new and relevant evidence along with his July 15, 1999 request for reconsideration. Consequently, appellant is not entitled to a review of the merits of his claim based on the third requirement under section 10.606(b)(2).

As appellant is not entitled to a review of the merits of his claim pursuant to any of the three requirements under section 10.606(b)(2), the Board finds that the Office did not abuse its discretion in denying appellant's July 15, 1999 request for reconsideration.

The Board also finds that the Office properly denied appellant's July 23, 1999 request for reconsideration.

Section 8128(a) of the Federal Employees' Compensation Act⁴ does not entitle a claimant to a review of an Office decision as a matter of right.⁵ This section vests the Office with discretionary authority to determine whether it will review an award for or against payment of compensation.⁶ The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).⁷ One such limitation is that the application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.⁸ Appellant failed to meet this particular requirement in that the Office's most recent merit decision was issued on July 17, 1998 and appellant filed his request for reconsideration more than a year later on July 23, 1999.

In those instances when a request for reconsideration is not timely filed, the Office will undertake a limited review to determine whether the application presents "clear evidence of error" on the part of the Office.⁹ In this regard, the Office will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.¹⁰

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.¹¹ The evidence must be positive, precise and explicit, and it must be apparent on its face that the Office committed an error.¹² Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish

⁴ 5 U.S.C. § 8128(a).

⁵ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁶ Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

⁷ 20 C.F.R. § 10.607 (1999).

⁸ 20 C.F.R. § 10.607(a) (1999).

⁹ 20 C.F.R. § 10.607(b) (1999).

¹⁰ *See Nelson T. Thompson*, 43 ECAB 919 (1992).

¹¹ *See Dean D. Beets*, 43 ECAB 1153 (1992).

¹² *See Leona N. Travis*, 43 ECAB 227 (1991).

clear evidence of error.¹³ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁴ The evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office decision.¹⁵

In this case, appellant failed to demonstrate clear evidence of error. Although, Dr. Glushakow stated in his July 14, 1999 report that, due to appellant's neck and back pain he was totally disabled from mid-May until he returned to full-time limited duty on September 12, 1995, his report is not of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant. His opinion is of limited probative value in view of the fact that he appears to attribute appellant's current condition to a lifting incident that occurred on May 23, 1995 rather than to appellant's accepted employment injury of March 18, 1993. Consequently, the Office properly declined to reopen appellant's case for merit review under section 8128(a) of the Act.

The decisions of the Office of Workers' Compensation Programs dated August 12 and July 20, 1999 are hereby affirmed.

Dated, Washington, DC
December 15, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

Valerie D. Evans-Harrell
Alternate Member

¹³ See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

¹⁴ See *Leona N. Travis*, *supra* note 12.

¹⁵ *Thankamma Mathews*, 44 ECAB 765, 770 (1993).